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September 22, 2016

Via ECFS

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Filing of the American Cable Association on Business Data Services in an Internet Protocol Environment, WC Docket No. 16-143; Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25, AT&T Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Service, RM-10593.

Dear Ms. Dortch:

On September 20, 2016, Ross Lieberman, American Cable Association ("ACA") and Thomas Cohen, Kelley Drye & Warren LLP, Counsel to ACA, met with Howard Symons, General Counsel, Matthew DelNero, Chief, Wireline Competition Bureau, and Deena Shetler, Associate Bureau Chief, Wireline Competition Bureau, to discuss the above-referenced dockets.[1]

ACA represents approximately 750 smaller facilities-based providers of voice, video, and broadband services.[2] Hundreds of them have invested substantial amounts over the past decade

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1 *Business Data Services in an Internet Protocol Environment et al.*, WC Docket No. 16-143 *et al*., Tariff Investigation and Further Notice of Proposed Rulemaking, FCC 16-54 (rel. May 2, 2016) ("FNPRM"). *See* Comments of the American Cable Association, WC Docket No. 16-143 *et al*. (June 28, 2016) ("ACA Comments"); Reply Comments of the American Cable Association, WC Docket No. 16-143 *et al*. (Aug. 9, 2016) ("ACA Reply Comments").

2 *See* Letter from Nearly 100 Competitive Facilities-Based Providers of Business Data Services to Chairman Tom Wheeler *et al*., WC Docket No. 16-143 *et al.* (Aug. 29, 2016). Many ACA providers were signatories to this letter. *See also* Letter from Professor Marius Schwartz, Department of Economics, Georgetown University to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-143 *et al*.

and continue to invest to provide business data services ("BDS") or BDS-like services to commercial customers. In virtually all instances, they provide BDS using newly deployed fiber facilities and packet-based electronics – and many of them provide these services in smaller communities and rural areas. In all instances, they compete with the incumbent price cap local exchange carrier and often compete with numerous other non-incumbent providers.

ACA did not file comments in response to the many Commission notices over the past decade to examine whether and how to regulate the provision of BDS (also known as special access services) by incumbent price cap local exchange carriers. Rather, its members first became involved in this proceeding when the Commission instituted its mandatory data collection, directing BDS providers to disclose extensive information about their provision of these services.[3] ACA became engaged in response to the FNPRM, in which for the first time the Commission raised the possibility that non-incumbent providers of BDS would be subject to more extensive rate regulation. Since then, ACA's advocacy has been directed solely to oppose the imposition of any rate regulation regime, including price caps or benchmarks on non-incumbent providers, and instead ensure these providers continue to be subject to the longstanding "light touch" regulatory regime.

ACA representatives explained that the Commission's almost four decade old non-dominant carrier policy, pursuant to which these non-incumbent providers have been subject to minimal regulatory requirements, has been a resounding success, and it continues to be a fundamental driver of investment, innovation, and competition.[4] Evidence in the record buttresses this conclusion: many hundreds of facilities-based providers are spending tens of billions annually to build fiber networks and provide high-speed packet-based BDS to commercial customers at rates that are decreasing by well-over 10 percent annually.[5] Assuming this trend continues, non-incumbents should roughly double their market presence in four to five years – further reducing areas where competition does not yet exist and greatly benefiting customers. In contrast, no party has submitted into the record either an economic theory to regulate the rates of non-incumbents or evidence non-incumbents are pricing at non-competitive (unjust and unreasonable) levels.

(Sept. 15, 2016). Professor Schwartz submitted a declaration as part of the ACA Comments.

3 *Special Access for Price Cap Local Exchange Carriers et al.*, WC Docket No. 05-25, RM-10593, Report and Order, 28 FCC Rcd 13189 (WCB 2013).

4 *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1 (FCC 1980).

5 *See, e.g.*, ACA Comments at 26-37.

Moreover, non-incumbents are not only investing in broadband networks and deploying BDS in urban markets, but in rural areas as well. Most ACA members serve these more economically challenging areas; yet, they are finding that even with the greater risk, there is an opportunity to bring high-performance BDS to these markets where customers often have only low-speed access from the incumbent. Of course, not having their service subject to rate regulation is material for non-incumbents to make these riskier investments, since it gives providers the flexibility to recoup their substantial capital expenses through a variety of mechanisms, including by entering into long term contracts with their customers. Whereas non-incumbents generally seek a three to five year payback on investments in more urban areas, providers in rural areas often need and are willing to accept a longer payback.

While non-incumbents offering BDS on a common carriage basis today are subject to the rate regulation provisions of the Communications Act, including complaints,[6] they have not been subject to price cap or benchmark rate regulation, both of which are proposed in the FNPRM. The ACA representatives explained that imposing these types of rate regulation on non-incumbents will impose material costs,[7] deterring entry and expansion by these providers. This is especially the case for smaller providers that see opportunities now and in the future to deploy BDS in more rural areas where customers want alternatives to the often low-speed services provided by the incumbent.

ACA is not alone in expressing concerns that rate regulation will act as a "tax" on non-incumbents. Level 3 Communications, a proponent of the Commission's proposal, has called the use of benchmarks "highly intrusive" and explained that a complaint process would be

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6 47 U.S.C. §§ 201, 202, 208. *See* ACA Reply Comments at 11 ("No commenting party contended that non-incumbent rates are not just and reasonable…nowhere in the FNPRM does the Commission provide evidence…or otherwise contend that rates of non-incumbents are not just or reasonable in any geographic market."),

7 The cost of BDS regulation will be especially substantial because the service is a complex offering with customers often obtaining unique rates, terms, and conditions. For instance, the ACA representatives explained that one member was able to win a contract by agreeing to serve ten cell tower sites for a major wireless provider, with the sites being in both urban and rural areas. Under the long-term agreement, the provider was offering both lit, packet-based Ethernet service and dark fiber. There also was a mix of non-recurring charges, recurring rates, early termination fees, and other charges. The ACA representatives averred that it was practically impossible for this provider to determine how it would comply with any benchmark or other rate regulation if it wanted to enter into another complex deal – and that subjecting non-incumbents to this type of regulation would stifle the very investment and innovation that the Commission was seeking in this proceeding. One ACA member submitted a declaration stating that the imposition of rate regulation would "'change the game' for its whole business model." ACA Comments at 39.

particularly problematic for smaller providers, because they lack the resources to participate, and would result in them having a "substantial disincentive to deploy facilities."[8]

For all of these reasons, the Commission should maintain its light touch regulatory policy for non-incumbents. The value of maintaining this approach is recognized, albeit in a far too limited fashion, by the main proponents of the Commission's proposal, Verizon and INCOMPAS, who propose that the Commission not subject new entrants to benchmarks "at least until the FCC reassesses market competition in approximately three years."[9] ACA representatives indicated to Commission staff that it appreciates this recognition, but these proponents offer no cogent basis for abandoning at any time the Commission's light touch regulation of non-incumbents. They also do not offer any rationale why the Commission should revisit a decision to not impose rate regulation on non-incumbents in three years. Instead, they rely upon the inapt concept of "provider neutrality," which only applies where providers are similarly situated – which clearly does not apply where incumbents have been granted monopoly rights and guaranteed returns and non-incumbents must risk their own capital against incumbents and other entrants. In addition, Verizon/INCOMPAS fail to recognize that a Commission order indicating that the Commission will revisit whether to rate regulate non-incumbents will have an immediate impact on investment, since the payback period on investments is often longer, especially in rural areas,[10] and the overhang from potential regulation will be taken into account immediately by bankers who will pass the increased risk onto non-incumbent providers, thus slowing investment and further competition. Instead, the Commission should affirm that its light touch approach for non-incumbents has been successful and that its effectiveness will continue indefinitely (i.e. without setting any deadline for re-examination).[11]

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8 *See* Letter from Thomas Jones, Counsel to Level 3 Communications, LLC to Marlene H. Dortch, Secretary, Federal Communications Commission WC Docket No. 16-143 *et al*. at 4 (July 25, 2016).

9 *See* Letter from Kathy Grillo, Senior Vice President, Public Policy and Government Affairs, Verizon, and Chip Pickering, Chief Executive Officer, INCOMPAS, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-143 *et al*. at 2 (Aug. 9, 2016); Letter from Maggie McCready, Vice President, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-143 *et al*. at 3 (Sept. 12, 2016).

10 Bankers will be especially hesitant to fund investment in higher cost areas.

11 ACA does not dispute the Commission's authority to revisit its decision at any time. Therefore, setting a deadline for revisiting a decision is legally unnecessary. Notwithstanding ACA's view that the Commission should not set a date for revisiting its decision to continue its light touch approach for non-incumbents in an order, should the Commission believe it should establish a timeframe, it should state in the order that it will not revisit its decision for at least five years, and it should not alter non-incumbents' regulatory status until it first reexamines the BDS market and reassesses its definition of

This letter is being filed electronically pursuant to Section 1.1206 of the Commission's rules.

Sincerely,

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competition and second examines the value of continuing light touch regulation. Moreover, it should state in such Order that if the Commission eventually decides it has sufficient evidence to find regulation of non-incumbents to be economically and legally sound and alters non-incumbents' regulatory status, any new rules should not apply to existing contracts in place at the time. While, as discussed herein, ACA has focused its advocacy so far on ensuring non-incumbents continue to be subject to light touch regulation, should the Commission not continue this policy, it should (a) follow the advice of ACA's economist, Marius Schwartz, to not regulate packet-based BDS provided over fiber facilities since the Commission should encourage investment in this critical infrastructure and since these facilities will not be deployed pursuant to any monopoly franchise with a guaranteed return, and (b) apply a "competition" test that recognizes that investment and entry are occurring and can readily occur across most of the country – and that recognizes that entry in rural areas, where incumbents dominate, is critical and more challenging and therefore should be especially encouraged.